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September 27, 1995

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

William F. Caton, Secretary  
Federal Communications Commission  
Room 222  
1919 M Street, N.W.  
Washington, D. C. 20554

Re: Comments in Response to Second Memorandum  
Opinion and Order and Third Notice of Proposed  
Rulemaking, PR Docket No. 89-552 (RM-8506), GN  
Docket No. 93-252, GN Docket No. 93-252

DOCKET FILE COPY ORIGINAL

Dear Mr. Caton:

Transmitted herewith, on behalf of Columbia Cellular Corporation ("Columbia"), are comments in response to the Commission's Third Notice of Proposed Rulemaking in captioned proceeding.

Columbia requests that each Commissioner be provided with a separate copy of these comments. Accordingly, pursuant to the requirements of Section 1.419 of the Commission's Rules, we are submitting the original and nine copies of Columbia's comments.

Should any questions arise with regard to this filing, please communicate with the undersigned member of this firm.

Respectfully submitted,

SANTARELLI, SMITH & CARROCCIO

By:



A. Thomas Carroccio

Counsel for  
Columbia Cellular Corporation

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D. C.

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of

Amendment of Part 90 of the	)	
Commission's Rules to Provide	)	
for the Use of the 220-222 MHz	)	
Band by the Private Land Mobile	)	PR Docket No. 89-552
Radio Service	)	RM-8506
Implementation of Sections 3(n) and 332	)	
of the Communications Act	)	GN Docket No. 93-252
Regulatory Treatment of Mobile Services	)	
Implementation of Section 309(j) of the	)	
Communications Act -- Competitive	)	PP Docket No. 93-253
Bidding, 220-222 MHz	)	

COMMENTS OF  
COLUMBIA CELLULAR CORPORATION

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Columbia Cellular Corporation ("Columbia"), by its attorneys, and pursuant to Section 1.415 of the Commission's Rules, hereby submits comments in response to the Second Memorandum Opinion and Order and Third Notice of Proposed Rulemaking in the captioned proceeding.<sup>1</sup> For its comments Columbia states as follow:<sup>2</sup>

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<sup>1</sup> Second Memorandum Opinion and Order and Third Notice of Proposed Rulemaking, PR Docket No. 89-552 (RM-8506), GN Docket No. 93-252, GN Docket No. 93-252, FCC 95-312 (released August 28, 1995) (hereinafter "NPRM").

<sup>2</sup> As Columbia will continue its participation in the 220 MHz service under whatever operating rules the Commission may adopt from time to time, Columbia will not comment herein on the NPRM's proposals for changes in system operations. Instead, Columbia's comments will focus on only the NPRM's proposed treatment of pending non-commercial, nationwide applications.

### Procedural Matters ..

Columbia has the requisite standing to participate in the captioned proceeding. Columbia filed, and presently maintains, two of the thirty-three non-commercial nationwide 220 MHz (hereinafter "NCNW") applications currently pending before the Commission.<sup>3</sup> Columbia filed its NCNW applications in reliance upon the Commission's Rules, which specify that a lottery process will be utilized to select among timely filed competing NCNW applicants. If the NPRM's proposals are adopted, the pending NCNW applicants, including Columbia, will suffer the return of their applications, and the loss of all rights and priorities attendant therewith. Such a deprivation of Columbia's rights as a pending applicant would be adverse to Columbia's interests. Accordingly, Columbia is entitled to protect its interests through participation in the captioned proceeding.

These comments are timely in that they are submitted by September 27, 1997, the comment date specified in the NPRM.<sup>4</sup>

#### The Commission is Required to Give Meaningful Consideration to the Use of Lotteries for Selection Among NCNW Applicants

Although the Commission is authorized to award certain radio licenses through competitive bidding (i.e., auction) processes,<sup>5</sup>

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<sup>3</sup> As permitted by the 220 MHz rules, Columbia maintains one 10-channel NCNW application and one 5-channel NCNW application.

<sup>4</sup> By Order, DA 95-1955 (released September 12, 1995), the Commission denied a request for an extension of time in which to file comments responsive to the NPRM.

<sup>5</sup> 49 U.S.C. Section 309(j).

Congress also gave the Commission discretion to retain the use of random selection procedures (i.e., lotteries) in situations where competing applications for radio authorizations were filed prior to July 26, 1993.<sup>6</sup> The Commission has acknowledged its discretion under the Budget Reconciliation, and previously has invoked that discretion in determining to continue the use of certain lottery selection procedures.<sup>7</sup> As the NCNW applications have been pending since May 1991, the Commission must recognize that it has the discretion to award NCNW authorizations through the use of lotteries.

The discretion regarding lotteries granted the Commission by the Budget Reconciliation is not unbridled. That very discretion also imposes upon the Commission an affirmative obligation to give meaningful consideration to the use of lottery procedures for selection among competing applications pending as of July 26, 1993.<sup>8</sup> Such consideration must take into account all equitable factors, as well as factors relating to the effective implementation of overall policy.<sup>9</sup> Columbia submits that Commissioner Quello captured the essence of the Commission's discretion regarding the future use of lotteries in stating,

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<sup>6</sup> Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, Section 6002(e) (hereinafter "Budget Reconciliation").

<sup>7</sup> Cellular Unserved Areas, 9 FCC Rcd 7387 (1994).

<sup>8</sup> See, WAIT Radio v. Federal Communications Commission, 418 F.2d 1153 (D.C. Cir. 1969).

<sup>9</sup> Id.

"...Congress intended for [the Commission] to exercise discretion to weigh the equities on a service by service basis rather than to reflexively use auctions in each and every case."<sup>10</sup>

The Commission Should Maintain the Integrity  
of the Present Pool of NCNW Applicants and Should  
Utilize Lottery Procedures to Award NCNW Authorizations

By giving the Commission the discretion to retain lotteries for selection among applications filed prior to July 26, 1995, Congress explicitly acknowledged that it was appropriate to spare long-standing applicants the inequity of having their procedural rights and priorities disrupted by the newly mandated competitive bidding processes. As the NCNW applications have been pending since May 1991, over two years prior to the exception date specified in the Budget Reconciliation, those applications are entitled to a presumption that they are among the intended beneficiaries of the discretionary exemption from competitive bidding.

The NCNW applications present a clear illustration of why Congress saw fit to provide long-standing applicants with equitable relief from the competitive bidding process. The NCNW applications were filed by parties able to meet stringent "entry criteria". By filing their applications under the then extent rules, the NCNW applicants also evidenced a commitment to meet aggressive buildout benchmarks and severe limitations on the sale

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<sup>10</sup> NPRM, Separate Statement of Commissioner James H. Quello  
(footnote citations omitted).

of excess system capacity. That the restrictions and conditions accepted by the NCNW applicants were substantial burdens is evidenced by the fact that of the approximately 59,000 220 MHz applications filed with the Commission, only thirty-four, or 0.058%, were NCNW applications. Equally telling is the fact that 140 applicants sought the four 5-channel commercial nationwide authorizations, but only twenty applicants sought the equal capacity NCNW authorizations. While approximately 59,000 220 MHz applications have been processed, and while approximately 3,800 220 MHz authorizations have been issued, only thirty-three NCNW applications remain pending and unresolved.

Why, after being pending for over five years, haven't the NCNW applications been processed? Why haven't any NCNW authorizations been issued? No one has ever suggested that the NCNW applications are defective, or that the NCNW applicants are unqualified. None of the NCNW applicants has failed to respond to application requirements promulgated by the Commission. Instead, the continued pendency of the NCNW applications after five years, and the lack of NCNW authorizations in the face of approximately 3,800 commercial 220 MHz authorizations, are the results of the Commission's backlog. To now single out this minuscule group of 220 Mhz applicants for disparate treatment would make a mockery of the Commission's clear discretion to provide equitable relief to long standing applicants.

During the Commission's July 28, 1995 meeting at which the NPRM was adopted ("Commission Meeting"), there was discussion as

to whether the NCNW applicants have any "rights" by virtue of their long pending applications. Columbia submits that it and the other NCNW applicants do have such rights.

Thousands of applicants sought authority to participate in the 220 MHz service. All those applicants, including the NCNW applicants, filed applications during the same filing window. All those applicants, including the NCNW applicants, sought entry to a coordinated, integrated 220 MHz service. All those applicants, including the NCNW applicants, had a choice as to how they would participate in a coordinated, integrated 220 MHz service. All those applicants, including the NCNW applicants, anticipated the selections among competing applicants would be made by lottery. Each of those applicants, including the NCNW applicants, had the expectation that its applications would be treated in the same manner as all other 220 MHz applications.

Today, however, only the thirty-three NCNW applications remain pending. Today, only the NCNW authorizations remain unissued. Today, only the NCNW applicants face the prospect of having their applications dismissed, for no fault of those applicants. Today, only the NCNW applicants face the prospect of an expanded pool of applicants for the authorizations sought by them. Today, only the NCNW applicants face the prospect of having to expend substantial monies to acquire authorizations the other 220 MHz applicants acquired for the cost of application fees and processing costs. In sum, the NCNW applicants are being threatened with treatment significantly different than that

afforded thousands of other 220 MHz applicants. Columbia is constrained to remind the Commission that such disparate treatment of applicants is prohibited.<sup>11</sup>

The changes to NCNW authorizations proposed by the NPRM are essentially cosmetic and do not create a new and distinct service warranting the solicitation of new applications. Such proposed changes merely modify the rules of an established service. The fiction that the proposed modifications of the NCNW authorizations will create some new and distinct service is belied by the fact that the modifications proposed by the NPRM will modify all 220 MHz authorizations; the existing nationwide and local authorizations as well as the unawarded NCNW authorizations.

The continuing and proposed disparate treatment of the NCNW applicants will compel the present NCNW applicants to either totally abandon their statuses as NCNW applicants, or enter an enlarged applicant pool. The continuing and proposed disparate treatment of the NCNW applicants also will deprive the NCNW applicants of the opportunity to obtain NCNW authorizations by lottery, and require those applicants to expend substantial sums to obtain authorizations other 220 MHz applicants obtained at a relatively low cost. In sum, the proposed rules will place the NCNW applicants at a severe competitive disadvantage to the existing 220 MHz authorization holders. Columbia contends that

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<sup>11</sup> See, Melody Music, Inc. v. Federal Communications Commission, 345 F.2d 730 (D. C. Cir. 1965).



such changes would constitute deprivation of its rights as a pending NCNW applicant.

Columbia was troubled that the Commission Meeting was rife with references to the financial status of certain NCNW applicants (e.g., AT&T, GE and UPS). There were assertions that such applicants could afford to pay for the subject authorizations. It also was opined that it would be inappropriate for the Commission to visit a windfall upon some of the richest companies in America. The Commission, however, should not rely on this factor.

It should be clear to even a casual reviewer of the list of NCNW applicants that several of those applicants are nowhere near the size of the companies repeatedly cited by the Commissioners. More importantly, however, such factors are inappropriate for Commission consideration. The courts have made clear that the Commission cannot make decisions on the basis of the "unique reputations" of involved applicants.<sup>12</sup> Instead, the Commission may consider only relevant qualifications when evaluating the disposition of pending applications.

It also appears to Columbia that the Commission believes its proposed switch to auctions is justified by a history of speculation and trafficking by lottery participants and winners. Columbia submits that the Commission already has made ample

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<sup>12</sup> See, Northeast Cellular Telephone Co., L.P. v. Federal Communications Commission, 897 F.2d 1164 (D.C. Cir. 1990).

provision in its rules governing the 220 MHz service for the deterrence of speculation and the prevention of trafficking.

For the specific purpose of deterring speculation, the Commission adopted stringent entry criteria for applicants seeking nationwide 220 MHz authorizations (both commercial and non-commercial).<sup>13</sup> Further deterrence to speculation came in the form of nationwide system buildout benchmarks.<sup>14</sup> That those entry criteria and buildout requirements were effective in deterring speculative activity regarding the nationwide authorizations is evidenced by a comparison of the few applications seeking nationwide authorizations (140 commercial and 34 non-commercial) with the tens of thousands of applications seeking the local authorizations to which no meaningful entry criteria were attached.

The Commission's purported concern over trafficking is sought to be justified by a belief that, historically, lottery winners did not place their systems in operation; but merely sold the authorizations obtained through lottery windfall. Any legitimate concerns as to potential trafficking in nationwide authorizations should be obviated by the system buildout benchmarks. In addition, Section 90.153(a) of the Commission's Rules provides the Commission with the necessary tools to prevent unjust enrichment from the trafficking in any 220 MHz

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<sup>13</sup> 220-222 MHz Report and Order, 6 FCC Rcd 2356, Paras. 46-55 (1991).

<sup>14</sup> 47 C.F.R. Section 90.725(h).

authorizations obtained through the lottery process. In sum, the extant rules assure that lottery winners will place their systems in operation, and will prevent lottery winners from turning a quick buck through early sales of authorizations won by lottery.

Columbia deems it necessary to again put the Commission on notice that a mere refund of the NCNW applicants' filing fees will not provide any real equitable relief. For its part, Columbia has incurred substantial out-of-pocket expense in connection with the preparation, filing, maintenance and prosecution of its NCNW applications. Those expenses include, but have not been limited to, consultant fees, counsel fees and the costs of preparing feasibility studies and business plans, obtaining independent financial analyses, and obtaining required financial commitments. In the event the Commission adopts the NPRM's proposals, Columbia will be compelled to write-off its investment in NCNW, without ever having enjoyed the benefits promised by the Commission's rules governing the NCNW selection process. This is an equitable consideration the Commission must keep in mind when acting on the NPRM.

**Comparative Hearings are Not  
Appropriate in the NCNW Context**

The Commission twice has addressed the option of using comparative hearings to award NCNW authorizations; and twice has declined to utilize that selection procedure. In adopting the original rules for the 220 MHz service, the Commission rejected the use of comparative hearings "because [it] [did] not believe

that comparative criteria could be developed that would draw meaningful distinctions between competing applicants", and because comparative hearings would not be "likely to produce a result more enlightened or more in the public interest than would a lottery selection process."<sup>15</sup> When the Commission revisited the comparative hearing issue on reconsideration, it reaffirmed its previous conclusion that lotteries are preferable to comparative hearings as mechanisms for awarding NCNW authorizations.<sup>16</sup>

Columbia submits that there is no legitimate, present reason for the Commission to reverse its previous findings and conclusions regarding the undesirability of comparative hearings.

However, in the event the Commission decides to repudiate its long-standing position regarding comparative hearings, it must do that which it previously deemed unfeasible; it must develop and promulgate comparative criteria which will "draw meaningful distinctions" between the NCNW applicants. In addition, fundamental procedural fairness will require that, after promulgating such comparative criteria, the Commission will need to afford the existing NCNW applicants reasonable opportunities to amend their applications to meet such newly articulated criteria. Accordingly, the Commission must be prepared to justify, and accept, an extended delay in the

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<sup>15</sup> 220 MHz Report and Order, 6 FCC Rcd 2356, 2365 (1991).

<sup>16</sup> 220 MHz Memorandum Opinion and Order, 7 FCC Rcd 4484 (1992).

initiation of 220 MHz service, which delay inevitably will result from any utilization of comparative hearing processes.

Conclusion

In light of the foregoing, the Commission should reject the NPRM's proposal's regarding the pending NCNW applications; affirmatively exercise its discretion regarding the use of lotteries as the NCNW selection method; and expeditiously proceed to award the NCNW authorizations by lotteries among the existing pool of thirty-three long standing applications.

Respectfully submitted,

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September 27, 1995